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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

NOV - 9 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Section 309(j) )  
of the Communications Act ) PP Docket No. 93-253  
Competitive Bidding )  
 )

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

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## SUMMARY

Nextel Communications, Inc. (Nextel), a leader in developing creative and efficient uses of licensed spectrum, has long advocated use of auctions to assign licenses in the Personal Communications Service (PCS). Nextel supports much of the Commission's auction proposal, but suggests several modifications that will allow the Commission to take greater advantage of the efficiency-enhancing features competitive bidding.

The oral ascending bid auction should be the Commission's primary methodology because it facilitates efficient aggregation of licenses. When oral bids on individual licenses and sealed combinatorial bids are used, a further round of bidding between the winners of the two auctions should be held.

To avoid diminishing the value of BTA licenses, BTA licenses should be auctioned before MTA licenses. BTAs and then MTAs should be auctioned in descending order by population.

The Commission should not restrict combinatorial bidding to two nationwide PCS licenses, but should promote efficiency and increase competition in bidding by allowing bids on any and all combinations of spectrum blocks and geographical areas. Nextel urges the Commission to go beyond its limited and possibly uneconomic proposal for two nationwide groups of MTA licenses and allow the marketplace,

rather than the Commission, to decide the optimal groupings of licenses.

All licenses should be freely transferrable at all times. Neither transfer restrictions nor payments intended to recoup assumed windfall profits are consistent with the need to create incentives for investment in the enterprises of designated entities.

Actual tender of upfront payments by all auction participants, and collection of substantial, nonrefundable deposits from high bidders, are necessary to discourage participation by speculators.

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**I. INTRODUCTION.**

Nextel Communications, Inc. ("Nextel"), pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission (the "Commission"), hereby submits its Comments in response to the above-captioned Notice of Proposed Rulemaking (the "Notice") concerning use of competitive bidding to award licenses for use of the radio spectrum.<sup>1</sup>

Nextel (formerly Fleet Call, Inc.) is a leader in developing advanced, highly-efficient, wide-area digital mobile communications systems. It conceptualized and is operating or constructing Enhanced Specialized Mobile Radio ("ESMR") systems. These systems incorporate state-of-the-art technology, including digital speech coding, Time

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<sup>1</sup>Implementation of Section 309(j) of the Communications Act: Competitive Bidding, Notice of Proposed Rulemaking, PP Dkt. No. 93-253, FCC 93-455 (released October 12, 1993).

Division Multiple Access transmission and frequency reuse to yield in excess of 15 times the customer capacity of existing Specialized Mobile Radio systems while providing improved transmission quality and enhanced services. Nextel's first ESMR system became operational in Los Angeles in the summer of 1993. In total, its systems will serve over 100,000,000 people.

As a pioneer in the creative and efficient use of licensed spectrum, Nextel has long been an advocate of auctions as the most economically efficient method of placing spectrum in the hands of the persons who will put it to its best use. Indeed, in April, 1992 Nextel filed a petition for rulemaking with the Commission recommending congressional authority be sought to license SMR spectrum through a competitive bidding process.<sup>2</sup>

In its comments in the Personal Communications Service ("PCS") rulemaking, Nextel urged the Commission to pursue Congressional authorization to use competitive bidding procedures for PCS authorizations.<sup>3</sup> Nextel is thus highly gratified by the addition of § 309(j) to the Communications Act and by the Commission's prompt institution of this

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<sup>2</sup>Policy and Rules for Licensing Fallow 800 MHz Specialized Mobile Radio Spectrum Through a Competitive Bidding Process, Petition for Rulemaking, RM - 7985 (filed April 22, 1992).

<sup>3</sup>Amendment of the Commission's Rules to Establish New Personal Communications Services, Gen.Dkt No. 90-314, Comments of Fleet Call, Inc. (filed November 9, 1992), at 9-12.

proceeding to implement the new legislation. Nextel supports many of the Commission's tentative conclusions and proposals. In several areas, however, Nextel believes the Commission can take greater advantage of the efficiency-enhancing features of the auction mechanism.

## II. BACKGROUND.

The pros and cons of auctioning licenses for use of radio spectrum have been the subject of intermittent public debate for over forty years.<sup>4</sup> Not until the Omnibus Budget Reconciliation Act of 1993 (Budget Act), however, did Congress authorize the Commission to use competitive bidding in place of comparative hearings or lotteries to award spectrum licenses. New Section 309(j) of the Communications Act of 1934, as amended,<sup>5</sup> allows auction of certain types of initial licenses or construction permits for which mutually exclusive applications have been accepted for filing. The Budget Act requires the Commission to adopt implementing regulations under Section 309(j) by March 8, 1994, and to begin issuing licenses in the new Personal Communications Services by May 7, 1994. The Commission and interested parties must thus stride quickly through this new

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<sup>4</sup>See Congressional Budget Office, AUCTIONING RADIO SPECTRUM LICENSES 11-12 (1992).

<sup>5</sup>47 U.S.C. § 309(j) (1993).

regulatory territory.<sup>6</sup>

### III. DISCUSSION.

- A. Oral auctions should be used for the sale of individual PCS licenses; sealed bids should be taken for groups of licenses.

In the Notice the Commission discusses four basic auction methods: oral ascending bid, sealed first bid, descending bid, and sealed second bid. It tentatively concludes that the oral ascending bid auction should be its primary, but not exclusive, method.<sup>7</sup> For PCS licenses, the Commission tentatively concludes that individual licenses should be offered at oral auction but that sealed bids should be taken for the same licenses when bid on as part of a group.

Nextel supports these tentative conclusions. Oral auction is a time-tested and familiar procedure that permits rapid and efficient award of individual licenses or a group

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<sup>6</sup>At the same time, the Commission must also address petitions for reconsideration of its decisions in the PCS docket and develop a regulatory framework for PCS in the Commercial Mobile Services Proceeding. See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, Gen Docket No. 90-314, FCC 93-451 (released October 22, 1993) (PCS Order); Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, Notice of Proposed Rulemaking, GN Docket No. 93-252, FCC 93-454 (released October 8, 1993) (Commercial Mobile Services NPRM). Nextel intends to participate in both proceedings. In the instant comments, however, Nextel will address the PCS auction proposals in terms of the allocation scheme adopted in the PCS Order, even though Nextel does not agree with, and will urge the Commission to change, some of the choices made in that Order.

<sup>7</sup>Notice, ¶¶ 36-48.



of licenses to the bidder that values it the most. Because oral auctions will be sequential, bidders will always know which licenses have been acquired, and which remain to be auctioned. Consequently, a bidder's offer can be adjusted to its needs, technical requirements and business plans. As the Commission observes, this will facilitate efficient aggregation of licenses.

Oral auctions are by their nature open and observable, which should promote public confidence in the process. Taxpayers will know that the Treasury received the best price available for the licenses that are auctioned in this way. The openness of the process allows and encourages participation by bidders who might have innovative ideas for creating new services, but who might not have unlimited resources, because they can be assured that they will be able to obtain the spectrum they need without paying more than they must, as could occur in a sealed bid auction.<sup>8</sup>

Nextel acknowledges the Commission's concern that the openness of oral auctions could also facilitate collusion. Nextel believes the Commission must guard against collusion undermining any bidding methodology it adopts. Given the

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<sup>8</sup>As the Commission notes, this same result can be achieved with the sealed second bid auction. However, Nextel believes that this form of auction, however desirable from a theoretical standpoint, should be avoided because it unnecessarily draws attention to the fact that the winning bidder might have been willing to pay more to acquire a particular license.

many participants who have expressed an interest in PCS through obtaining experimental licenses and filing comments in the Commission's proceedings, Nextel believes the interest in PCS is too great for any collusive practice to succeed.<sup>9</sup> Moreover, Nextel submits that, at least in the case of PCS licenses that are offered in groups by sealed bid as well as individually at oral auction, the sealed bidding will also act as a check on the ability of bidders to collude to keep prices low. In any case, Nextel agrees with the Commission's tentative conclusion that the advantages of oral auctions far outweigh the disadvantages.

Nextel agrees that the proposed system of taking sealed bids for license groups before oral auction of individual licenses, but opening the sealed bids only after the oral auction is completed, will help assure that the two auctions reveal the values of each individual license and of each possible grouping of licenses.<sup>10</sup>

Nextel also supports the proposal for a second round of sealed bidding on PCS licenses between the winners of the sealed bid auctions of license groups and the winners of the auctions of individual licenses. If individual bidders are

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<sup>9</sup>In Nextel's judgment, the danger of risk of collusion is far greater in instances in which the interest in a license is limited to a small group of interested persons or entities.

<sup>10</sup>As discussed more fully below, the Commission should rely on the auction process to determine the optimal groupings of licenses, both geographically and across spectrum blocks.

not permitted this opportunity to make a counteroffer, they will always be at a disadvantage. This is because in bidding only against each other, they will never have had the opportunity to bid directly against the combinatorial bidders.<sup>11</sup> In addition, this will generate greater funds for the U.S. Treasury because only higher bids will be accepted in this second stage, limited auction.

**B. BTA licenses should be auctioned before MTAs; within each spectrum block, the license for the largest market should be offered first.**

In the Notice the Commission observes that the order in which items are offered can affect the outcome of a sequential auction. The Commission states its intention to select the sequence for bidding that best facilitates economically efficient aggregation of licenses, both across geographic regions and spectrum blocks.<sup>12</sup>

For broadband PCS, the Commission specifically proposes the following sequence for offering the 30 MHz MTA licenses (spectrum blocks A and B): (1) Sealed bids would be taken for a group consisting of all 51 licenses on block A<sup>13</sup>; (2) the 51 individual licenses in block A would be offered at an oral auction; (3) the licenses in block A would be awarded;

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<sup>11</sup>Participants in the sealed bid auction, on the other hand, are presumably bidding against their estimate of what the combined individual auctions will yield, as well as against each other.

<sup>12</sup>Notice, ¶ 52.

<sup>13</sup>Nextel addresses the Commission's unduly limited proposal for combinatorial bidding on PCS licenses below.

(4) the process would be repeated for block B.<sup>14</sup> Within each spectrum block the Commission proposes to offer the largest market first, proceeding in descending order of population to the smallest market. The Commission also seeks comment on the method that should be used when PCS licenses are auctioned across spectrum blocks rather than across geographical areas.<sup>15</sup>

Nextel agrees that the order in which licenses are offered will affect the prices at which licenses are sold. The Commission's proposals for PCS, however, stop short of fully recognizing the interdependence of the values bidders will place on all of the PCS licenses, BTA as well as MTA. Nextel therefore recommends that, to avoid diminishing the value of the BTA licenses, the Commission adopt the following coordinated approach to auctioning all of the PCS licenses: (1) Auction all BTA licenses before any MTA licenses, to avoid diminishing the value of the BTA licenses. (2) Within each MTA, offer all BTA licenses with the largest BTA first, then proceed in descending order of population to the smallest BTA. (3) Auction all licenses in the largest MTA, then proceed in descending order of population to the smallest MTA.

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<sup>14</sup>Notice, ¶ 120.

<sup>15</sup>Notice , ¶ 125.

**C. Participants in the PCS auctions should be permitted to bid on any and all combinations of licenses.**

In the Notice the Commission recognizes that a group of licenses may have a value greater than the sum of the values of the individual licenses in the group, and that allowing bidding only on the individual licenses fails to assign such a group of licenses to its highest and best use. The Commission therefore proposes to accept combinatorial bids for certain spectrum blocks.<sup>16</sup> In the case of the PCS auctions, the Commission specifically proposes to conduct a "significant test" of combinatorial bidding by soliciting sealed bids on two nationwide groups of 30 MHz MTA licenses (spectrum blocks A and B.) If, after all 51 licenses in a block were auctioned individually, the winning nationwide bid exceeded the sum of the bids on the individual licenses, the 51 licenses would be awarded as a group.<sup>17</sup> The Commission also seeks comment on allowing combinatorial bids on all of the BTA licenses within each MTA;<sup>18</sup> on use of combinatorial bidding to aggregate 10 MHz broadband PCS blocks into 20 MHz or 30 MHz blocks; and on allowing aggregation across both geographical areas and spectrum blocks.

Nextel strongly supports the concept of combinatorial

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<sup>16</sup>Notice, ¶¶ 57-62

<sup>17</sup>Notice, ¶ 120.

<sup>18</sup>Notice, ¶ 123.

bidding, and commends the Commission for its acceptance of this approach. However, Nextel urges the Commission to go beyond its limited and possibly uneconomic proposal for two nationwide groups of MTA licenses and allow the marketplace, rather than the Commission, to decide the optimal groupings of licenses. The Commission should allow participants in the PCS auctions to bid on any and all combinations of MTA licenses consistent with Commission imposed spectrum caps and other relevant eligibility restrictions.<sup>19</sup> This approach will assure that licenses are assigned in the initial auction to the party that will put them to the highest and best use.<sup>20</sup>

Given that no wireless provider now offers service nationwide, grant of such a license for PCS would give the winner of a nationwide combinatorial bid an enormous competitive advantage. Because there are likely to be many

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<sup>19</sup>For example, a party should be permitted to submit a combinatorial bid for the MTAs in the southwestern United States as a logical service area having common characteristics, such as widely separated metropolitan centers, and similar communications needs.

<sup>20</sup>In the Notice the Commission raises the question whether combinatorial bidding generally, and nationwide grouping of PCS licenses specifically, would result in anticompetitive behavior. Notice, n. 39, n. 115. Nextel submits that this is a legitimate concern, and that one remedy is to allow bidding on less-than-nationwide groups of licenses. An expanded array of possible groups will increase the number of parties that submit combinatorial bids, increase competition for geographical combinations of licenses, and decrease the chance that anticompetitive behavior by any one party will control the outcome of an auction.

markets the winner would elect not to serve, it can be expected to "flip" them to the loser of the MTA bid for a price approximating the losing bid, capturing for itself as profits, revenues that might accrue to the Treasury under a freer bidding scheme. Combinatorial bids for fewer than all MTAs, on the other hand, will enhance auction revenues, because it will permit entities that may not participate in a national consortium to place a high value on the group of markets for which they may bid.

Likewise, parties bidding on BTA licenses should be encouraged to submit bids reflecting precisely the groupings of spectrum blocks and areas that they require for the services they intend to provide. For example, a bid on all BTA licenses on two 10 MHz spectrum blocks in four MTAs should be permitted. If the apprehensions expressed by Commissioner Barrett in his separate statement and in his dissent to the PCS Order concerning the viability of small spectrum blocks prove apt, then broad application of the combinatorial bidding technique would provide an important corrective measure.<sup>21</sup>

**D. All licenses purchased at auction should be freely transferable.**

In the Notice the Commission seeks comment on appropriate regulatory responses to the statutory

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<sup>21</sup>See Notice, Separate Statement of Commissioner Andrew C. Barrett at 2-3; PCS Order, Dissenting Statement of Commissioner Andrew C. Barrett.

requirement that it "require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."<sup>22</sup> The Commission observes, correctly, that resale of a license purchased at the market price in an unlimited auction does not "unjustly enrich" the seller. Accordingly, the Commission concentrates its inquiry on the question whether transfer restrictions or monetary penalties should be imposed upon licensees that may receive some special preference in the auction process. The Commission assumes that when, as is proposed in the case of PCS, spectrum blocks are set aside to be bid on only by "designated entities"<sup>23</sup>, those entities will be able to purchase spectrum at below market prices and thus be in a position to be unjustly enriched by a sale at the market price.

Nextel believes that there should be no restrictions on the free transfer of any license. This is particularly important in the case of PCS. PCS is a new, developing service. There will be experiments that fail -- service offerings to which consumers do not respond. There will also be many potential participants in this service who will

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<sup>22</sup>47 U.S.C. § 309(j)(4)(E); Notice, ¶ 83

<sup>23</sup>Section 309 (j)(4)(D) requires that the Commission ensure that small businesses, rural telephone companies, and businesses owned by minorities and women have the opportunity to acquire spectrum. In the Notice the Commission refers to these groups as "designated entities."



not be able to acquire the licenses they need to carry out their plans in the initial auctions. The public interest will best be served if licenses can expeditiously be transferred from those that cannot use them to those that will. Furthermore, if PCS is to evolve into the rich family of services that the Commission has said it envisions, investment in innovative uses of spectrum must be encouraged. Innovation and investment will be discouraged if investors cannot be assured that they can sell their licenses to someone with a better idea.

The Commission is thus quite correct when it states in the Notice that "outright prohibition on transfer, even for a limited time such as a year, may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in owners capable of bringing service to the public expeditiously."<sup>24</sup> Acting on this observation, the Commission, while seeking comment on transfer prohibitions, focusses its attention on developing a system of payments that would prevent designated entities from realizing "windfall profits" on sales of licenses. What the Commission fails to recognize, however, is that any financial disincentive that discourages sale of a license by an owner that cannot or will not develop it will have the same undesirable effects as a direct prohibition on transfer.

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<sup>24</sup>Notice, ¶ 84.

The Commission discusses various difficulties in calibrating payments so that windfalls can be avoided while investment incentives are preserved.<sup>25</sup> The problem of balancing these two essentially incompatible goals is complex. The Commission notes, for example, that the idea that profits from sales of licenses by designated entities should be recaptured is fundamentally incompatible with use of tax certificates as an incentive for investment.<sup>26</sup> Nextel submits that the same conceptual incompatibility also exists with respect to any other preference device that is intended to attract capital to the enterprise of a designated entity. Even with set asides, the incentive to outside investors in the enterprise comes as much from the likelihood that the license can be resold at a profit as it does from the exclusion of non-favored entities from the initial bidding. Transfer restrictions would severely attenuate the intended beneficial effects of any type of preference on the ability of designated entities to participate in PCS.

First, the Commission must recognize that profit per se is not evil. Second, auction purchases by "designated entities" will not necessarily create the potential for windfall profits. In some markets, for some licenses, there may be sufficient competition among designated entities to

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<sup>25</sup>See Notice, ¶¶ 86-88.

<sup>26</sup>Notice, n.67.

drive the price up to the market level.<sup>27</sup> The 20 MHz licenses that the Commission proposes to set aside for designated entities may have greater value than some non-set-aside blocks, which of course would cause bidders to bid more for them. And third, any gain designated entities would reap will be reduced by capital gains taxes paid to the Treasury, thereby reducing concerns of unjust enrichment.

Furthermore, sales of licenses by "designated entities", even if made soon after purchase and at a profit, may not always fall under the category of "unjust enrichment." For example, a small business that sells a license that it cannot develop in one MTA and uses the proceeds to buy other spectrum or invest in another business cannot be said to have been "unjustly enriched." It is merely making optimal use of the economic opportunity afforded it under the Commission's preference rules. Thus, recapture of supposed "windfall profits" would involve the

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<sup>27</sup>The Commission seems to believe that it will be possible in some cases to determine the price that would have been paid in the absence of set aside by looking to comparable sales in open auctions. Notice, ¶ 86. However, in the case of PCS, the 20 MHz BTA licenses that are proposed as set asides are unique. The proposed 10 MHz set aside license will also not be comparable to the other 10 MHz licenses in a given BTA if the latter are aggregated through combinatorial bidding. The proposed approach of treating all profits from sale of a set aside license as windfall is based on the unsupportable assumption that the price at which license may sell perhaps a year after an auction is equal to what the market price would have been at the time of the auction.

Commission in case-by-case examinations of each and every suspect transaction. In addition, no simple rule could be fair in all cases. Given Congress's repeated pronouncements that bidding should be an improvement over existing administratively burdensome methods of granting licenses, such as lotteries and comparative hearings, the imposition of such needless burdens on entities Congress has identified for special consideration cannot be justified.

**E. Bidders should be required to make substantial upfront payments; high bidders should be required to make a large, immediate, nonrefundable deposits.**

In order to ensure that only serious, qualified bidders participate in auctions, the Notice proposes to require that each bidder make a substantial upfront payment. This payment would be in addition to any other financial qualification requirement and application fees that might apply to a particular service. The Notice seeks comment on the size of this payment, and on whether the Commission should require it to be tendered or merely exhibited. The Notice also seeks comment on proposals for collecting a nonrefundable deposit from the high bidder.

Nextel strongly agrees that the Commission should require substantial upfront payments as a means of discouraging non-qualified bidders from participating in spectrum auctions. A requirement to tender a substantial nonrefundable payment well in advance of the actual auction will have the beneficial effect of focussing the business

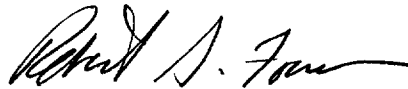
plans of the auction participants. A putative auction participant will be far more cautious in placing its funds on the auction table if these funds are forfeited if the participant is the successful bidder but is ultimately determined to be unqualified to hold a PCS license.

#### **IV. CONCLUSION.**

As a long-time advocate of spectrum auctions, Nextel applauds the Commission's proposal to use auctions to assign PCS licenses. The Commission should give greater play to market forces by allowing combinatorial bidding on any and all combinations of PCS licenses. It should preserve

investment incentives by making all licenses purchased at auction freely transferable.

Respectfully submitted,  
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